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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

DR. PHILIP J. FICHMAN, *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner, Philip J. Fichman, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in this proceeding on October 29, 1971.

JUDGMENT BELOW

The orders of the United States Court of Claims, not reported, granting respondent's motion to dismiss the petition and denying petitioner's motion for rehearing, appear in the Appendix hereto. No opinion in this case has been rendered by the Court of Claims.

JURISDICTION

The judgment of the Court of Claims was entered on October 29, 1971. A timely motion for rehearing was denied on February 18, 1972, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1255 (1).

QUESTIONS PRESENTED

1. Whether petitioner's suit is barred by the statute of limitations, in light of Court of Claims precedents allowing "continuing" claims, never time-barred, in like circumstances.

2. Whether, where respondent misled petitioner with respect to the applicable period of limitations, the doctrine of equitable estoppel precludes the respondent from asserting the statute of limitations as a defense to this petitioner's suit.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

§ 2501. Time for filing suit

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

STATEMENT OF THE CASE

When, in 1942, the petitioner was called to active duty in the U.S. Army, he was first given a physical examination by an Army doctor who reported the following diagnosis of the condition of petitioner's feet: "1st degree, pes planus, bilateral, non-symptomatic." Pes planus is popularly known as flat feet. Petitioner was found to be physically qualified for military ser-

vice and in June 1942 he entered active service in the Army as an officer.

After having been required to participate in strenuous physical training, often carrying the weight of a full pack, the petitioner first began to experience pain and cramps in his legs and feet. His discomfort became progressively more severe, but he was still required to take part in training. The petitioner was then given a prolonged course of medical treatments by the Army which was to continue for three years without success. In 1945, the petitioner was ordered to appear before an Army Retiring Board which was authorized to determine whether petitioner was incapable of performing his duties and, if so, what the cause of his incapacity was and whether that cause was the result of an incident of service. An Army Retiring Board, meeting on November 20, 1945 (and hereinafter referred to as the 1945 Board), found petitioner to be suffering from "pes planus, third degree, symptomatic, bilateral," found him thereby to be permanently incapacitated for active military service, and found that this incapacity was the result of an incident of service, in that his pre-existing, non-symptomatic condition had been permanently aggravated as a consequence of such service.

Pursuant to these findings, the petitioner was, on February 20, 1946, relieved from active duty in the Army by reason of physical disability. However, the Secretary of War then informed the petitioner that action on the findings of the 1945 Board was to be held in abeyance and that if he did not choose to return to active duty "for further observation, treatment, and final disposition," the War Department would take such action in his case "as is considered consistent with facts available."

The petitioner returned to active duty and was ordered to appear before a second Retiring Board convening on October 17, 1946 (hereinafter referred to as the 1946 Board). The 1946 Board found, unlike the 1945 Board, that petitioner's permanent incapacity had existed prior to his entry on active duty and that it had not been permanently aggravated by military service. The Secretary of War, on behalf of the President, then approved the findings of the 1946 Board and the petitioner was again relieved from active duty by reason of physical disability, but without entitlement to retirement pay. He has never received such pay.

After the meeting of the 1945 Board, the petitioner had been given by the respondent a document promulgated by it entitled "Information For Officers Being Retired." That document stated that "at any time up to 15 years an officer may have a review of the type of dismissal received other than a dismissal by virtue of a court-martial." Petitioner assumed that this 15-year period applied to his claim for disability retirement pay.

The petitioner was in 1959, less than 15 years after his original release from active duty, advised by the Adjutant General of the Army that administrative review of the denial to him of disability retirement pay was available, and that consequently "it appears that filing suit with the Court of Claims is not appropriate at this time." The Adjutant General further stated: "However, if a suit with the Court of Claims is contemplated, an Act of Congress is not necessary as a condition precedent to filing." These representations induced petitioner to further delay filing suit while he pursued administrative remedies unsuccessfully. He has also unsuccessfully sought relief through pri-

vate legislation introduced in the Congress, designed to confer jurisdiction on the Court of Claims to hear his claim. He filed suit for disability retirement pay on June 1, 1971.

REASONS FOR GRANTING THE WRIT

1. The Applicability Of The Statute Of Limitations To Claims Against The United States For Pay Is An Important Question Of Federal Law Which Remains Unresolved By The Court Of Claims

The refusal by the Court of Claims to hear petitioner's case perpetuates a fundamental confusion which that Court has created concerning the application of the statute of limitations (28 U.S.C. § 2501) to claims against the United States for sums which are disbursed in periodic installments. Included within this category are all claims by federal employees and military personnel for pension or disability payments.

In describing a case similar to this one which was decided by it 10 years ago, the Court of Claims said, in language equally applicable herein: "this is another suit for disability retirement pay in which the first issue is whether the claim is barred by the six-year statute of limitations, 28 U.S.C. § 2501. There are a multitude of cases—past, present, and potential—involving this thorny question" (*Friedman* v. *U.S.*, 310 F.2d 381 at 384, Ct. Cl. 1962). Yet despite the attempt by the Court of Claims in that case to "spell out in detail . . . the rules we shall now follow" (*Id.*) with regard to such cases, the instant case raises the same "thorny question." The Court of Claims has not only improperly denied this petitioner a right to be heard, but it has also left completely in doubt what its interpretation of the statute of limitations is.

In applying the provisions of the six-year statute of limitations with respect to claims against the United

States for pay, the Court of Claims has differentiated between so-called "continuing" claims and all other claims. A claimant ordinarily is considered to have a single cause of action against the United States which accrues when his entitlement to pay is finally determined. Suit upon such claims is time-barred six years after that determination has been made. However, the Court has held that certain circumstances give rise to a "continuing" claim for pay. Such claims are "continuing" in the sense that they involve claims for amounts which are disbursed in periodic installments; each time the United States fails to make payment to a claimant of one such installment, a new cause of action in his favor in the amount of that installment is deemed to have accrued. A claimant whose claim is of this latter type can thus bring suit for all installments which fell due and were not paid during the six years next preceding the date of filing suit, even though the original action of the United States which led to its refusal to make the periodic payments took place more than six years before suit was filed (*Friedman, supra*).

Petitioner contends that his claim for disability retirement pay meets the conditions which have been held by the Court of Claims to give rise to a continuing claim, and that consequently the statute of limitations does not bar his suit for such pay, at least with respect to monthly installments thereof due and unpaid in the six years next preceding the date of filing. A continuing claim in his favor arose, petitioner maintains, when he was correctly found by a Retiring Board to have been permanently incapacitated as the result of an incident of service, was relieved from active duty by reason of that incapacity, and was then denied entitlement to disability retirement pay by the action

of the Secretary of War in wrongfully withholding his approval of petitioner's right to receive such pay.

Petitioner, in urging this position, relies on decisions by the Court of Claims which he contends establish an interpretation of the statute of limitations pursuant to which the respondent's motion to dismiss must properly have been denied. In *Friedman* v. *U.S., supra,* the Court of Claims attempted to make explicit what it considered to be the basis for the distinction which it had been making between continuing claims and other claims. Essentially, the Court held, continuing claims arose when Congress had not established any administrative tribunal or officer to determine as a matter of fact or of law the claimant's eligibility for the particular pay sought, and when the Court was called upon to resolve only "sharp and narrow factual issues not demanding judicial evaluation of broad concepts such as 'disability' " (*Id.,* at 384-85). When those conditions are met, it was held, the cause of action accrues "as soon as the payor fails or refuses to pay what the law (or the contract) requires . . . and each successive failure to make proper payment gives rise to a new claim upon which suit can be brought" (*Id.,* at 385).

Then, in a decision approximately 13 months after *Friedman,* the Court of Claims established a new interpretation of continuing claims which broadens that concept substantially, and which requires that this petitioner's claim be treated as a continuing one. In *Barnes* v. *U.S.* (163 Ct. Cl. 321, 1963), the Court of Claims held that a claim for disability retirement pay based on a finding by an Army Retiring Board was a continuing claim. It was held that plaintiff Barnes' right to receive disability retirement pay, although

originally dependent upon administrative determination of his eligibility by a Retiring Board, and therefore not continuing, had "passed beyond" that condition once the administrative determination in his favor had been made by a Retiring Board, and the Secretary of War had wrongfully refused to release the plaintiff from military service and to implement the Board's determination. Plaintiff Barnes' claim was held to have become at that point in time independent of administrative determination, and therefore "continuing." In subsequent decisions, the Court of Claims has followed *Barnes* (*Lerner* v. *U.S.*, 168 Ct. Cl. 247, 1964; *Wason* v. *U.S.*, 179 Ct. Cl. 623, 1967; *Cosgriff* v. *U.S.*, 181 Ct. Cl. 730, 1967).

Petitioner has alleged circumstances which, if proven, would establish that, after the Retiring Board had found in his favor, his entitlement to disability pay was wrongfully denied him by the Secretary of War. He contends, in this respect, that the Secretary of War acted in violation of governing Army Regulations which created a presumption that his disability was caused or aggravated by military service, and which provided further that this presumption could only be overcome by evidence based on "well-established medical principles." The record will show that no such evidence was relied on by the Secretary of War when he withheld his approval of the finding of the 1945 Retiring Board.

Petitioner agrees with the holding of the Court of Claims that to litigate now the factual issues which were decided by the Retiring Boards which considered his case would defeat the purposes of the statute of limitations, which are "to protect the defendant from stale claims where it would be difficult or impossible

for him to obtain the necessary testimony and evidence, due to the passage of time, and to relieve the courts of the burden of deciding cases on facts which cannot be clearly ascertained." (*Roberts* v. *U.S.*, 151 Ct. Cl. 360, at 363, 1960). But the resolution of this case depends only on the record of petitioner's physical condition, the Board proceedings, and the Secretary's actions, so the Court of Claims cannot refuse to hear it on that basis.

The petitioner, having thus made allegations which, if proven, would establish the existence of a continuing claim in his favor, is entitled to the opportunity to be heard with respect to those allegations. There is no justification in the interpretation of the statute of limitations which the Court of Claims has promulgated for denying petitioner this opportunity.

2. The Ruling By The Court Of Claims That The United States Is Not Subject To An Equitable Estoppel Should Not Be Allowed To Stand

The petitioner maintains that the doctrine of equitable estoppel precludes reliance by the respondent on the statute of limitations in the circumstances present herein because the respondent has by its misrepresentations induced the delay in filing suit on which it now seeks to rely as a defense. The grant by the Court of Claims of respondent's motion to dismiss the petition is thus in effect a ruling that even if all of petitioner's allegations of misleading conduct by the respondent are proven, there can be no equitable estoppel against respondent.

A misrepresentation by an employer to his employee of the period available for filing suit against the employer may be the basis for an equitable estoppel (*Glus* v. *Brooklyn Eastern District Terminal* (359 U.S. 231,

1959). Petitioner submits that the principle of *Glus* applies to this case where the employer misrepresenting the statutory limitation period is the sovereign. Indeed, there is stronger reason for estoppel of the sovereign's assertion of the defense of the statute of limitations than for estoppel of a private party's assertion of that defense in the same circumstances, since misrepresentations by the sovereign of the content of its own statute of limitations are more likely to be accepted as authoritative, and thus more likely to mislead.

In *Glus, supra,* this Court held that a "petitioner is entitled to have his cause tried on the merits if he can prove that respondent's responsible agents . . . conducted themselves in such a way that [he] was justifiably misled into a good-faith belief" (at 235) that he could begin his action after the expiration of the applicable period of limitations. Petitioner submits that that rule is equally applicable herein.

Federal Crop Ins. Corp. v. *Merrill* (332 U.S. 380, 1947), on which respondent relies, does not resolve the issue raised herein. That decision does not involve a statute of limitations; there was no employer-employee relationship between the parties in that case as there is herein and in *Glus;* and in *Federal Crop Ins. Corp.,* the result hinged at least in part on the fact, not involved herein, that the plaintiff had constructive notice of the true content of the regulation which had been misrepresented to him by virtue of its publication in the Federal Register.

The issue herein is, in its broadest aspect, nothing less than the nature of the duty owed by the sovereign to its citizens. Respondent's position is in effect that when the sovereign undertakes to inform the citizen of

rights arising out of that citizen's service to the sovereign and in doing so misinforms him to his prejudice, it may nevertheless be allowed to profit from this wrong. Petitioner submits that this is indeed an important issue of potentially broad applicability, and therefore one which should be resolved by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF CLAIMS

No. 480-71

DR. PHILIP J. FICHMAN

v.

THE UNITED STATES

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges*.

Order

This case comes before the court on defendant's motion, filed June 30, 1971, to dismiss the petition. Upon consideration thereof, together with the opposition thereto, without oral argument, it is concluded that plaintiff's alleged claim is barred by the statute of limitations, 28 U.S.C. § 2501, and

IT IS ORDERED that defendant's said motion to dismiss the petition be and the same is granted and the petition is dismissed.

BY THE COURT

JUDGE LARAMORE
Acting for the Chief Judge.

October 29, 1971.

IN THE UNITED STATES COURT OF CLAIMS

9-68 The Beryllium Corporation
189-68 James M. Callan
451-70 Gaylord M. Huggins
480-71 Dr. Philip J. Fichman
731-71 John Morris Kelley

v.

The United States

Before COWEN, *Chief Judge*, LARAMORE and DURFEE, *Senior Judges*, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges*.

Orders

These cases come before the court on motions for rehearing, reconsideration, judgment, and for further relief under Rules 151 and 152 of the Rules of this court and, on consideration thereof,

It is ordered this 18th day of February, 1972, that said motions be and the same are denied as follows:

9-68 The Beryllium Corporation. Plaintiff's motion for rehearing.

189-68 James M. Callan. Plaintiff's motion for rehearing.

451-70 Gaylord M. Huggins. Plaintiff's motion for rehearing.

480-71 Dr. Philip J. Fichman. Plaintiff's motion for rehearing.

731-71 John Morris Kelley. Plaintiff's motion for rehearing en banc.

By the Court

/s/ Wilson Cowen
Chief Judge

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1506

DR. PHILIP J. FICHMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner filed this action in the United States Court of Claims seeking disability retirement pay based upon his Army service from 1942 to 1946. He alleges the following facts: On November 20, 1945, an Army Retiring Board found him permanently disabled because of flat feet, a condition which the Board found had existed prior to his military service but had been aggravated by that service (Pet. 3). The Board's findings were not approved by the Secretary of War, however, so petitioner appeared before a second Re-

tiring Board on October 17, 1946 (Pet. 3-4). The second Board found that petitioner's incapacity had existed prior to his service on active duty and had not been permanently aggravated by his service. The Secretary approved these findings, and on November 3, 1946, petitioner was released from active duty by reason of physical disability, but without retirement pay (Pet. 4; Ct. Cl. Pet. XXII [1]).

Petitioner also alleges that in 1945 he was advised that dismissals from the service, if not by court-martial, could be reviewed at any time up to fifteen years (Pet. 4). In 1959, the Army Adjutant General advised petitioner that he still had available administrative remedies and that "it appears that filing suit with the Court of Claims is not appropriate at this time" (Pet. 4).[2] Petitioner then applied to the Army Disability Review Board, which denied his claim on July 19, 1960, and to the Army Board for the Correction of Military Records, which denied relief on June 20, 1962 (Ct. Cl. Pet. XXVIII, XXIX).[3]

This action was filed on June 1, 1971 (Pet. 5). The Court of Claims held (Pet. App. 1a) that petitioner's claim was barred by 28 U.S.C. 2501, which provides

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[1] "Ct. Cl. Pet." references are to the petition filed by petitioner in the Court of Claims.

[2] A copy of the Adjutant General's 1959 letter is attached as an exhibit to the Court of Claims petition. That letter also states: "Although administrative remedy may be available, this does not preclude filing suit with the Court of Claims."

[3] On March 1, 1962, the Veterans' Administration awarded petitioner compensation for flat feet (Ct. Cl. Pet. XXX).

in part: "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

2. The decision below—which merely involves the application by the Court of Claims of well-settled rules for determining when claims accrue for purposes of applying the statute of limitation—is correct, and further review is unwarranted.

In seeking to escape the impact of 28 U.S.C. 2501, petitioner argues that the government's failure to pay each periodic installment of disability pay gives rise to a separate cause of action (Pet. 6). Claims for disability retirement pay, however, generally accrue upon the first final administrative disapproval of the serviceman's claim and are barred if suit is not instituted within six years. See *Friedman* v. *United States*, 310 F. 2d 381, 395-396, certiorari denied, 373 U.S. 932; *Lipp* v. *United States*, 301 F. 2d 674, certiorari denied, 373 U.S. 932. An exception to this general rule has been established for cases where all the prerequisites for entitlement to disability retirement pay have been met—*i.e.*, where the Retiring Board's finding of service-caused incapacity has been approved by the Secretary—but no payments have been made. *Wason* v. *United States*, 179 Ct. Cl. 623; *Lerner* v. *United States*, 168 Ct. Cl. 247; *Barnes* v. *United States*, 163 Ct. Cl. 321. In such cases, a continuing claim exists permitting suit at any time with respect to installments for the preceding six years. Petitioner's claim, however, is not within this excep-

tion since the Secretary never approved a finding of his service-caused incapacity. Therefore, his action has been barred since 1952, six years after the Secretary disapproved his claim.

3. Petitioner also contends that the government is estopped from asserting the statute of limitations since its misrepresentations induced him to delay filing suit (Pet. 9). In support of this allegation, petitioner points to the advice he received in 1945 that dismissals could be reviewed at any time up to fifteen years, and to the 1959 letter stating that suit was "not appropriate at this time" because administrative remedies had not been exhausted. The 1945 document appears to have referred only to administrative review under 10 U.S.C. 1554, which petitioner did in fact obtain. If this view is correct, the 1959 letter was of no effect since the statute of limitations had run long before it was written. In any event, petitioner's failure to file suit for almost nine years after the Correction Board's 1962 decision—the final administrative decision on his claim—cannot be attributed to either document.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1972.

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